

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3

4 - - - - - x

5 In the Matter of:

6 LEHMAN BROTHERS HOLDINGS INC., Case No. 08-13555-scc

7 Debtor.

8 - - - - - x

9

10 United States Bankruptcy Court

11 One Bowling Green

12 New York, New York 10004-1408

13

14 January 22, 2018

15 1:57 PM

16

17

18

19

20

21

22

23 B E F O R E:

24 HON. SHELLEY C. CHAPMAN

25 U.S. BANKRUPTCY JUDGE

1 IN RE: RMBS Claims Estimation Trial

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25 Transcribed by: Sherri L. Breach

1 A P P E A R A N C E S :

2 WILKIE FARR & GALLAGHER LLP

3 Attorneys for the Plan Administrator

4 787 Seventh Avenue

5 New York, NY 10019-6099

6

7 BY: TODD G. COSENZA, ESQ.

8

9 ROLLIN BRASWELL FISHER LLC

10 Attorneys for Unspecified

11 8350 East Crescent Parkway

12 Suite 100

13 Greenwood Village, CO 80111

14

15 BY: MICHAEL ROLLIN, ESQ.

16

17 HOLWELL SHUSTER & GOLDBERG LLP

18 Attorneys for the Trustees

19 750 Seventh Avenue, 26th Floor

20 New York, NY 10019

21

22 BY: MICHAEL S. SHUSTER, ESQ.

23 DANIEL GOLDBERG, ESQ.

24 DWIGHT A. HEALY, ESQ.

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

THE COURT: Okay. Oh, Mr. Goldberg.

(Laughter)

MR. GOLDBERG: Good afternoon, Your Honor.

THE COURT: Welcome back.

MR. GOLDBERG: Thank you.

THE COURT: We've missed you.

MR. GOLDBERG: Not too many people say that.

THE COURT: All right. Let's get started.

MR. GOLDBERG: So Mr. Rollin and I have decided that we should keep our day jobs. Post-production movie editing is not our strong suit. But, nevertheless, for purposes of today we've been able to work together to cut down the video that we're going to play in court.

THE COURT: Okay.

MR. GOLDBERG: The run time is about an hour, all in.

THE COURT: Okay.

MR. GOLDBERG: It includes designations and counter-designations from both sides. I don't believe Your Honor will be able to tell from the video who designated what, but we are more than happy to tell you should we believe that to be relevant.

Our plan is to after today for the parties to consult because there's more to the -- more video clips that

1 the parties would like the Court to review. We just are not  
2 showing them today to take the court time --

3 THE COURT: Okay.

4 MR. GOLDBERG: And then we'll submit to you a  
5 drive that will have, it will probably be closer to two and  
6 a half hours of video that Your Honor --

7 THE COURT: Okay. So let me --

8 MR. GOLDBERG: -- will just --

9 THE COURT: -- let me understand this.

10 So -- but is what you're going to give me on the  
11 drive going to be on some of the same -- so we're like --  
12 we're looking at a highlights reel today?

13 MR. GOLDBERG: That's actually not a bad way to  
14 look at it.

15 THE COURT: Okay.

16 MR. GOLDBERG: So the drive that we give you will  
17 include what is in here today.

18 THE COURT: Okay. So this is like a highlights  
19 reel and then what you're going to give me on the drive will  
20 be more.

21 MR. GOLDBERG: Correct. That's correct.

22 THE COURT: Okay. But I won't have to piece in  
23 what I'm seeing today with --

24 MR. GOLDBERG: You won't --

25 THE COURT: -- what I'm going to get on the drive?

1 MR. GOLDBERG: You will not. And, in fact, what  
2 we're also going to provide to Your Honor is what we've  
3 between the parties called a scrip so you will actually see  
4 the questions and answers on a piece of paper that you can  
5 line up to the date so that you're not solely reliant on  
6 looking at a video. If you want to find a piece of  
7 testimony later --

8 THE COURT: Right.

9 MR. GOLDBERG: -- you don't have to scroll through  
10 an hour of --

11 THE COURT: Right. Right. Right. Perfect.  
12 Okay. That sounds --

13 MR. GOLDBERG: Okay.

14 THE COURT: That sounds good.

15 MR. GOLDBERG: So with that we also -- if I may  
16 approach?

17 THE COURT: Sure.

18 MR. GOLDBERG: We have a binder to provide that  
19 has documents that were referenced in the video.

20 THE COURT: Great.

21 MR. GOLDBERG: And when -- there are more  
22 documents in that binder that are going to be relevant to  
23 the video today because we worked to cut down the video.  
24 But they will be relevant to the full piece when we submit  
25 it.

1 If at any point in time, Your Honor, when we get  
2 to the video we're going to look at a document on the -- in  
3 the video, I suspect we might have to pause it to allow Your  
4 Honor to get there in the document. So we can do that at  
5 any point. Obviously --

6 THE COURT: Okay. Well, the --

7 MR. GOLDBERG: -- you'll tell us --

8 THE COURT: Well, the --

9 MR. GOLDBERG: -- if you --

10 THE COURT: We're not going to -- I Mean, you can  
11 just pop up and --

12 MR. GOLDBERG: Sure.

13 THE COURT: -- you know, kind of a few seconds in  
14 advance. But I'll follow along. I've done this numerous  
15 times --

16 MR. GOLDBERG: Great. Great.

17 THE COURT: -- before. Okay.

18 And just let me say that I don't know if you  
19 wanted to put -- make a record as to --

20 MR. GOLDBERG: I do.

21 THE COURT: -- exactly what we're doing and I  
22 would like to express my appreciation for your working this  
23 out.

24 So do you want to do that? Mr. Rollin?

25 MR. ROLLIN: Sure. The only -- one thing I wanted

1 to add in advance of watching the video is that in the --  
2 during the course of the deposition, of course, I would have  
3 imposed an objection. I have consulted -- conferred with  
4 opposing counsel. We withdraw a significant majority of  
5 those. We're not going to require any sort of a ruling.

6 There are some, however, that we stand on.

7 THE COURT: Okay.

8 MR. ROLLIN: I don't think -- I think it would  
9 really hinder this process if we stood up and talked about  
10 them during the course of the video, but instead when we  
11 submit either the script, the script together with the  
12 longer video we'll then make our objections more clear,  
13 interpose any objections that were reserved, and then Your  
14 Honor, should you choose, can view the testimony in that  
15 light.

16 THE COURT: Okay. But you're not going to ask  
17 that as I would during the trial make some sort of a written  
18 disposition of those objections?

19 MR. ROLLIN: No. No, Your Honor.

20 THE COURT: What I've had done before and when  
21 we've done this kind of video testimony is actually  
22 literally to pause it and -- and deal with the objection.

23 But if you're okay with you preserve your  
24 objection. I do what I decide to do --

25 MR. GOLDBERG: I think --

1 THE COURT: -- later, then that's fine with me.

2 MR. GOLDBERG: I think that's how we envisioned it  
3 was if --

4 THE COURT: Okay.

5 MR. GOLDBERG: -- there's an objection to  
6 testimony we have briefing. There's going to be closing  
7 argument. If somebody thinks some piece of evidence is not  
8 admissible --

9 THE COURT: Great.

10 MR. GOLDBERG: -- we'll tell you.

11 MR. ROLLIN: Yeah. And many that Your Honor will  
12 hear today, again, are withdrawn. They're not going to be  
13 an issue. We'll just highlight those that --

14 THE COURT: Okay.

15 MR. ROLLIN: -- are issues with the further  
16 submission.

17 THE COURT: Okay.

18 MR. GOLDBERG: And so Your Honor asked for an  
19 overview so that we have a --

20 THE COURT: Yeah. Just so --

21 MR. GOLDBERG: -- record of --

22 THE COURT: -- we have a record.

23 MR. GOLDBERG: -- what we're doing.

24 So as we understand it one of the issues that Your  
25 Honor is going to be called upon to decide is whether or not

1 certain breaches have a material and adverse affect on the  
2 value of the loans such that they give rise to a valid put  
3 back right.

4 The plan administrator was to call Daniel Castro  
5 as their expert on that subject. As we understand it Mr. --

6 THE COURT: He is unavailable.

7 MR. GOLDBERG: He is unavailable. And in lieu of  
8 that the Court is going to accept Mr. Castro's expert  
9 reports and deposition designations from the trustees in  
10 response to that.

11 THE COURT: Okay. And --

12 MR. GOLDBERG: Also --

13 THE COURT: And the trustees, just so the record  
14 is completely clear, the trustees do not in any way dispute  
15 Mr. Castro's unavailability.

16 MR. GOLDBERG: Sorry. I thought you were going to  
17 say something else. Yeah. No. We do not dispute his  
18 unavailability. We do have an objection. We understand the  
19 ruling and the ship has sailed, but we have an objection to  
20 allowing his expert reports in without him testifying live  
21 and that we're not -- don't have an opportunity to cross-  
22 examine him at trial. We understand the ruling. We just  
23 want to make sure there's a record of the objection.

24 THE COURT: Right. So under all of the  
25 circumstances we're going to proceed as you've outlined.

1 It's the best -- I feel it's the best that we can do under  
2 the circumstances.

3 MR. GOLDBERG: Understood.

4 THE COURT: Okay. So --

5 MR. GOLDBERG: So with that --

6 THE COURT: -- with that --

7 MR. GOLDBERG: -- I think we can dim the lights  
8 and hit play.

9 THE COURT: I don't know if we need to dim the  
10 lights.

11 (Laughter)

12 MR. GOLDBERG: I did not mean literally.

13 (At 2:03 p.m. video played)

14 (At 2:06 p.m.)

15 MR. ROLLIN: Can we interrupt just for a moment?

16 THE COURT: Yes.

17 MR. ROLLIN: Your Honor, this seems to be  
18 inadvertent to me, but Mr. Goldberg and I had an agreement  
19 that that particular clip was not going to be shown, that  
20 last segment.

21 THE COURT: Well, I can tell you quite honestly I  
22 could not recall what was said if my life depended on it.

23 (Laughter)

24 MR. ROLLIN: I --

25 THE COURT: So I'm just -- what I'm reacting to is

1 we just kind of jumped into this. I don't -- I'm just  
2 trying to look at his report just to kind of frame a little  
3 bit more what he's about to talk about.

4 MR. GOLDBERG: So we -- okay. So we tried to  
5 assist the Court with that. But if you'll see like on the  
6 screen now we have a subject matter heading and then --

7 THE COURT: Right.

8 MR. GOLDBERG: -- when the testimony plays it will  
9 be related to that subject matter heading, and then when we  
10 switch topics there will be another subject matter heading.  
11 So the idea will be that the Court will at least know the  
12 subject that he is talking about.

13 THE COURT: Yeah.

14 MR. GOLDBERG: It is not necessarily keyed to a  
15 page in his report as --

16 THE COURT: Okay.

17 MR. GOLDBERG: -- as lined up.

18 I -- as far as what Mr. Rollin just said, I think  
19 I might have misunderstood about the playing of that  
20 segment. It's passed so Your Honor has just said you hadn't  
21 really seen it anyway. We did not intend to play a segment  
22 today that Mr. Rollin had consented to. I thought he had  
23 consented to that piece. That was inadvertent.

24 THE COURT: Okay.

25 MR. ROLLIN: Right. I did not contend to that.

1 These -- there are some things taken out of order and some  
2 completeness designations that were not included, so we  
3 discussed it ahead of time. So --

4 THE COURT: Okay. So why --

5 MR. ROLLIN: -- that's --

6 THE COURT: We'll leave that whole thing until the  
7 full -- the larger --

8 MR. GOLDBERG: Fair enough.

9 THE COURT: Yeah.

10 (Pause)

11 MR. ROLLIN: Your Honor --

12 THE COURT: Yes.

13 MR. ROLLIN: Sorry. One other concern. I  
14 apologize.

15 I didn't -- I did not know in advance of this  
16 showing that these headers were going to be shown to Your  
17 Honor. I knew that they -- that each segment had a heading.  
18 I have not studied the headings. I haven't had an  
19 opportunity to determine whether or not --

20 THE COURT: I see.

21 MR. ROLLIN: -- I think they fairly characterize  
22 the testimony.

23 THE COURT: So the headings are not going to be  
24 evidence and I'll take the headings as I would something on  
25 a demonstrative slide that you would present if Mr. Castro

1 were on the witness stand. Does that make it better?

2 MR. ROLLIN: Sure. That's fine, Your Honor. I  
3 just wanted to let you know we -- we may have concerns about  
4 the headings. I've heard Your Honor and I have nothing else  
5 to say about it.

6 THE COURT: Okay.

7 MR. GOLDBERG: To be clear they do have the  
8 headings, but we don't have to quibble about that.

9 THE COURT: Let's keep going, please.

10 (At 2:09 p.m. video played)

11 (At 2:37 p.m.)

12 MR. GOLDBERG: So, Your Honor, that's in the  
13 binder. It's -- go to Tab 6.

14 THE COURT: Got it. Thank you.

15 MR. GOLDBERG: And, Your Honor, just to save  
16 another pause it's -- the testimony is on page 31.

17 THE COURT: Great. Thank you.

18 (At 2:37 p.m. video played)

19 (At 2:50 p.m.)

20 MR. GOLDBERG: And we're just pausing to allow  
21 Your Honor to get there.

22 THE COURT: Okay. I'm there. Thank you.

23 (At 2:50 p.m. video played)

24 (At 2:50 p.m.)

25 MR. GOLDBERG: Pause for a second.

1 I'm giving you a second to get there.

2 THE COURT: I'm there. Thank you.

3 MR. GOLDBERG: Okay.

4 (At 2:50 p.m. video played)

5 (At 2:51 p.m.)

6 THE COURT: Mr. Goldberg, can I just ask you to  
7 pause this for a second?

8 MR. GOLDBERG: Sure. Of course.

9 THE COURT: I just want to put on the record, I  
10 don't know if this is out of nowhere, but I still have the  
11 GSC case.

12 MR. GOLDBERG: I've recently come to learn that.

13 THE COURT: Okay. So I still have a substantial  
14 open matter in that case. I inherited that case from Judge  
15 Gonzalez when he retired on the somewhat inaccurate  
16 representation that it was all done.

17 (Laughter)

18 THE COURT: The same thing was said about Lehman.  
19 So we know how that worked out.

20 I have no knowledge or awareness of Mr. Castro's  
21 involvement in GSC or specific knowledge about anything than  
22 glancing (sic) I'm looking at in the document that you just  
23 showed me.

24 When this started I thought I had heard him say  
25 GSC but I kind of let it pass. There's nothing about what's

1 pending before me that -- well, I can't say that there's  
2 nothing about it that overlaps as a general matter. I don't  
3 think it -- if -- what's pending before me in GSC will have  
4 no bearing on my view of Mr. Castro's opinions in this case.  
5 But I just thought it was important as I'm looking at this  
6 document right now and seeing specifically what he did  
7 during the 2005-2008 time frame that I just make this  
8 statement to all of you.

9 MR. GOLDBERG: I --

10 THE COURT: I'm a big believer in disclosure and  
11 no surprises.

12 MR. GOLDBERG: As I stand here today I'm not aware  
13 of anything that causes a conflict or problem simply because  
14 you're presiding over the bankruptcy of GSC and Mr. Castro  
15 is a, I believe a former, but I don't honestly even know  
16 that, former partner at GSC. I don't --

17 THE COURT: That's what it looked -- that's what  
18 it looks like. But, you know, I never had occasion to make  
19 that connection in that case or frankly until this  
20 afternoon, today when I heard what he said and I saw these  
21 documents which perhaps reveals that I didn't look at his  
22 background before today. But it is what it is.

23 So I just --

24 MR. GOLDBERG: Yeah. I --

25 THE COURT: Okay.

1 MR. GOLDBERG: I think from our perspective we  
2 don't see a problem in --

3 THE COURT: Okay.

4 MR. GOLDBERG: -- terms of a conflict.

5 THE COURT: I would ask the plan administrator  
6 counsel to --

7 MR. COSENZA: We have no --

8 THE COURT: Okay.

9 MR. COSENZA: -- objection, Your Honor.

10 THE COURT: All right.

11 MR. COSENZA: We don't see a conflict.

12 THE COURT: All right. So let's just keep going.

13 MR. GOLDBERG: Thank you.

14 (At 2:54 p.m. video played)

15 (At 2:57 p.m.)

16 MR. GOLDBERG: So, Your Honor, I've paused the  
17 video. If we were cross-examining Mr. Castro I would now  
18 pull out that testimony that I referenced and it's in your  
19 binder --

20 THE COURT: Okay.

21 MR. GOLDBERG: -- as Exhibit 1164, TRX-1164.

22 THE COURT: Yes.

23 MR. GOLDBERG: And this is a deposition testimony  
24 Mr. Castro gave in another RMBS case and this is available  
25 on Pacer. We pulled this transcript off of Pacer.

1 THE COURT: Okay. But it says filed under seal.

2 MR. GOLDBERG: I see that, but that's -- we got it  
3 off of Pacer and as I understand it that's how it is on  
4 Pacer. So if it might have been under seal at some point,  
5 it wasn't when we got it because we just pulled it off of  
6 the public docket.

7 THE COURT: Okay. Mr. Rollin.

8 MR. ROLLIN: Your Honor, I object to this -- the  
9 introduction of this document. I realize we're in an  
10 unusual proceeding and circumstance. And, nevertheless,  
11 bearing that in mind I -- this appears to be an excerpt. I  
12 don't know the context. I don't know what else was said.  
13 It wasn't raised during the course of Mr. Castro's  
14 deposition.

15 And in the course of the deposition there is  
16 always the possibility -- the federal rules explicitly deal  
17 with the possibility that a witness may become unavailable  
18 and then the parties are left with the transcript. The  
19 parties need to do what they need to do if they intend to  
20 use the transcript in a certain way.

21 With respect to this issue I understand that Mr.  
22 Goldberg anticipated cross-examining Mr. Castro and in that  
23 case Mr. Castro would have been able to contextualize and  
24 respond to this. But he did not ask those questions. And  
25 without being able to know the full context and respond, I

1 object on -- formally on relevance and hearsay grounds.

2 MR. GOLDBERG: I -- Your Honor, if I may respond.

3 (Pause)

4 THE COURT: Sure.

5 MR. GOLDBERG: Mr. Rollin I think was speaking  
6 about the federal rules and I'm sure he's talking about  
7 Federal Rule of Civil Procedure 32. And I think we would  
8 happily live with that, but we're actually not in this  
9 circumstance, for reasons that we spoke about, we're not  
10 limited to the deposition transcript. The plan  
11 administrator has been allowed to put in the expert reports  
12 of Mr. Castro which would never come in under a strict  
13 federal rules of evidence interpretation. So they've been  
14 given great leeway.

15 So it is true and I advised counsel that with  
16 respect to this exhibit, TRX-1164, which was produced to  
17 them in discovery by the way, that I specifically did not  
18 ask Mr. Castro about it in his deposition once he gave the  
19 sequence that we just played on the video because I was  
20 going to use it for impeachment at trial.

21 THE COURT: What was the last question at -- tell  
22 --

23 MR. GOLDBERG: It reads --

24 THE COURT: Not from the transcript. What did he  
25 say that you're now going to --

1 MR. GOLDBERG: Sure. That's what I was going to  
2 read.

3 THE COURT: Yeah. Go ahead.

4 MR. GOLDBERG: From the video the question is, "Do  
5 you recall testifying under oath that there was no such  
6 model" -- meaning baseline risk -- loan level baseline risk  
7 of loss models -- "available to investors until the earliest  
8 of 2008." "Question: Do you recall that or not?" "Answer:  
9 I don't recall that. No."

10 But then earlier in the sequence in the video we  
11 just played he said such models were available. He says he  
12 created them.

13 In the Exhibit 1164 starting on page 77 and line  
14 7, and it runs through page 79, line 10, Mr. Castro  
15 testifies pretty much to the opposite saying that from --  
16 and I had the date wrong. I -- in my questioning to him in  
17 his deposition I said 2008, but the reality is what he says  
18 is at some point in early 2007, between '05 and 2007 sum and  
19 substance what he says is that rating agencies and  
20 sophisticated institutional investors did not have the  
21 ability to model on a loan level a base front line risk of  
22 loss.

23 THE COURT: But then if you --

24 MR. ROLLIN: Your Honor --

25 THE COURT: -- if you continue to read the

1 transcript that you just put in it's -- there are a whole  
2 lot more questions and answers that elaborate on that; that  
3 --

4 MR. GOLDBERG: After page 2 -- after page 79?

5 THE COURT: I'm looking at page 79.

6 MR. GOLDBERG: Sure, because I'm saying after --  
7 you're saying there was more questions and answers after --

8 THE COURT: Right.

9 MR. GOLDBERG: If they want to counter-designate  
10 something --

11 THE COURT: So the --

12 MR. GOLDBERG: -- they're free to do that.

13 THE COURT: No. But the -- but now we're getting  
14 -- we're getting into never never land. I mean, the -- what  
15 I'm seeing on the page is not impeaching. So --

16 MR. GOLDBERG: He says -- if you look at  
17 specifically page 79, line 2 the question is:

18 "Question: So is it fair to say then that from  
19 2005 to 2007 most RMBS investors did not have or  
20 use loan level default models?"

21 "Answer: '05 and '06 that would be true. I'm not  
22 sure about '07 when people started catching up.  
23 But, yeah, there were some large sophisticated  
24 investors that like in '06 couldn't do it."

25 MR. ROLLIN: Your Honor, this is never never land

1 in multiple ways. First of all, I agree with Your Honor's  
2 observation, and we're looking at this now, that this isn't  
3 impeaching.

4 THE COURT: It's not impeaching.

5 MR. GOLDBERG: Well, how is it --

6 MR. ROLLIN: It's also not relevant, Your Honor,  
7 that --

8 THE COURT: He --

9 MR. GOLDBERG: I don't --

10 THE COURT: The question related to before 2008.

11 MR. GOLDBERG: And he's saying --

12 THE COURT: And he's saying, yeah, there were some  
13 before 2008.

14 MR. GOLDBERG: No. No. No. No. No.

15 THE COURT: Yeah. Yeah. Yeah. Yeah.

16 (Laughter)

17 THE COURT: Okay. So --

18 MR. GOLDBERG: The question is, do you recall  
19 testifying --

20 MR. SHUSTER: Counsel, respectfully --

21 MR. GOLDBERG: The -- I didn't say yeah. Yeah.  
22 Yeah. Yeah.

23 THE COURT: No. I'm not saying respectfully.

24 MR. SHUSTER: He is.

25 MR. GOLDBERG: I didn't say --

1 THE COURT: He's saying respectfully no, no, no,  
2 no, no. Okay. You know what? We're done. Okay. This is  
3 not coming in. We're going to move on.

4 MR. GOLDBERG: Okay.

5 THE COURT: Okay.

6 (Pause)

7 THE COURT: You know, I do -- these titles really  
8 are advocacy pieces I have to say. They are not plain  
9 vanilla subject matter headings.

10 MR. GOLDBERG: Well, we didn't tend -- intend it  
11 that way. We tried -- we were just trying to --

12 THE COURT: Okay. Using the words, proximate  
13 cause, that's not --

14 MR. GOLDBERG: Well, that's --

15 THE COURT: -- a subject matter heading. So --

16 MR. GOLDBERG: Well, the testimony talks about  
17 that.

18 THE COURT: Okay. All right. Keep going.

19 (At 3:04 p.m. video played)

20 (At 3:04 p.m.)

21 THE COURT: Yes, Mr. Goldberg.

22 MR. GOLDBERG: I just want to make sure Your  
23 Honor's there at the exhibit before we continue.

24 THE COURT: I was not that time actually. I was  
25 trying to make a note. What is the exhibit number?

1 MR. GOLDBERG: It's Exhibit TRX-1227. And, again,  
2 to save another stop the relevant testimony is addressed as  
3 something on page 4.

4 THE COURT: Okay. Thank you very much.

5 (At 3:05 p.m. video played)

6 (At 3:30 p.m.)

7 MR. GOLDBERG: Sorry. I just realized this little  
8 segment we have agreed not to put in. It's actually based  
9 on a misunderstanding --

10 THE COURT: Okay.

11 MR. GOLDBERG: -- between the witness and I.

12 THE COURT: And --

13 MR. GOLDBERG: And I think that ends the --

14 THE COURT: Okay.

15 MR. GOLDBERG: -- playing of the video.

16 THE COURT: I was about to observe that time  
17 seemed to be elongating. That was more than an hour, so.

18 MR. GOLDBERG: So I --

19 THE COURT: Okay.

20 MR. GOLDBERG: -- think that that ends the video  
21 and I -- as I mentioned --

22 THE COURT: Okay.

23 MR. GOLDBERG: -- at the outset the parties will  
24 confer and submit to Your Honor a more fulsome video.

25 THE COURT: Okay. All right. Excellent.

1 So, Mr. Shuster, yes.

2 MR. SHUSTER: Could we have a ten or 15 minute  
3 break?

4 THE COURT: Yes. I think that would be a good  
5 idea.

6 MR. SHUSTER: And then we're -- okay. Very good.

7 THE COURT: All right. Why don't you and Mr.  
8 Cosenza just come up for a moment?

9 (Sidebar off the record)

10 THE COURT: Okay. We're going to take a break and  
11 then I'm not exactly sure if it's going to be ten or 15, but  
12 the parties are going to let us know when they're ready to  
13 resume. All right.

14 Thank you very much.

15 MR. GOLDBERG: Thank you.

16 (Recessed at 3:32 p.m.; reconvened at 3:52 p.m.)

17 THE COURT: All right. Please have a seat.

18 So, Mr. Shuster.

19 MR. SHUSTER: The trustees have no more witnesses  
20 to call, Your Honor.

21 THE COURT: Okay.

22 UNIDENTIFIED SPEAKER: Your Honor, we obviously  
23 have no objection to that other than we were prepared to  
24 cross-examination Mr. Aronoff and in the context of that  
25 cross-examination we're prepared to show some video

1 testimony from experts that they've taken off of their trial  
2 list, specifically Mr. O'Driskell (ph) and Mr. Burnett (ph).

3 And the law is very clear that that type of  
4 testimony, specifically testimony from an expert that was  
5 submitted as a trial witness and later withdrawn is  
6 considered an admission by the other side and can come in.

7 And we're happy to do it on the papers, but I just  
8 wanted to put a placeholder in for that.

9 THE COURT: Yes, Mr. Healy.

10 MR. HEALY: Your -- I'm not sure that either one  
11 of the witnesses mentioned or the statements by them are  
12 adoptive admissions. If any of their transcript is to be  
13 designated since the reports were listed as exhibits to the  
14 transcripts, the reports ought also to come in through  
15 fault.

16 UNIDENTIFIED SPEAKER: That's not how the rule  
17 works, Your Honor. Adoptive admissions are essentially  
18 something that -- that is permitted to be admitted as  
19 evidence because it is an admission by the other side. They  
20 don't then get to designate their own witnesses testimony.  
21 The reason we get to designate it is because it's an  
22 admission by the other side.

23 MR. HEALY: Well, designations for -- counter-  
24 designations for completeness would always be --

25 THE COURT: Okay. You're -- you're just talking

1 entirely past each other. Okay. The point that's being  
2 made is that you designated a witness that you then  
3 withdrew. You've now decided -- you've decided to not call  
4 Mr. Aronoff, right, which would have created --

5 MR. HEALY: Well -- I'm sorry. I didn't mean to  
6 interrupt Your Honor.

7 THE COURT: Yeah, which would have created an  
8 occasion for them to introduce these other --

9 UNIDENTIFIED SPEAKER: Video clips and --

10 THE COURT: -- video clips.

11 UNIDENTIFIED SPEAKER: Right, deposition  
12 testimony.

13 MR. HEALY: Well, we called Mr. Aronoff on our  
14 direct case. They had the opportunity to put in whatever  
15 they thought was appropriate and what was permissible under  
16 the rules.

17 UNIDENTIFIED SPEAKER: Right. They --

18 MR. HEALY: The fact that we've not decided to go  
19 forward with them as a rebuttal witness doesn't entitle them  
20 to any further opportunity to use deposition testimony.

21 THE COURT: We're going to have to look at the  
22 rules. I thought we were done. This is not the dictionary  
23 definition of being done. So let me get my glasses. We can  
24 walk through the rules and we can try to figure this out.

25 UNIDENTIFIED SPEAKER: I'm happy to, Your Honor.

1 I have I think what can be helpful here, the rule of  
2 citations and some case law that would also help guide us on  
3 this issue.

4 MR. SHUSTER: May I -- may I just --

5 THE COURT: Uh-huh.

6 MR. SHUSTER: Procedurally the only thing I'll say  
7 is if the plan administrator is content to try to do this on  
8 papers, why don't we -- I mean, if they want to brief the  
9 rule briefly in a two-page letter and we can brief the rule  
10 --

11 THE COURT: I don't want to do that.

12 MR. SHUSTER: Okay.

13 THE COURT: I --

14 MR. SHUSTER: I --

15 THE COURT: I have to devote all of my time --

16 MR. SHUSTER: Yeah.

17 THE COURT: -- to working on a decision for you  
18 folks. So I don't -- I've been trying to avoid --

19 MR. SHUSTER: Yeah.

20 THE COURT: -- these ancillary --

21 MR. SHUSTER: Understood.

22 THE COURT: -- skirmishes. So you want to give me  
23 a -- you want to give me a rule, you want to give me some  
24 cases. Let's just try to do this right now.

25 UNIDENTIFIED SPEAKER: Yes, Your Honor. I'll be

1 brief. The rule is 801(d)(2) which outlines several types  
2 of statements that constitute the opposing party's  
3 admissions.

4 (Pause)

5 UNIDENTIFIED SPEAKER: And specifically  
6 801(d)(2)(B) is a party statement will be admitted as non-  
7 hearsay if it's a statement that (1) the party manifested  
8 that it adopted or believed to be true. And there's case  
9 law in the Southern District of New York, specifically  
10 Prepple versus Gutman Breast Diagnostics Institution (ph),  
11 and I can give the cite for that to Your Honor. It's a  
12 Westlaw cite, 1999WL1243891, Southern District of New York  
13 case 1999.

14 The plaintiff sought the admission of a  
15 radiologist opinion. The radiologist was designated by the  
16 defendant as an expert witness for trial. The defendant  
17 chose shortly before trial not to call that expert. And  
18 then, of course, the other side decided that they did want  
19 to call the expert because there were helpful admissions,  
20 much like in this case.

21 The expert did not appear for trial and in  
22 granting the plaintiff's motion the Court found it material  
23 that (1) the expert wrote a report that was served to the  
24 other side; (2) the expert gave a deposition; (3) the expert  
25 was identified as a trial witness in the pretrial order.

1 And here's what the Court said, which I think is material  
2 and relevant to this case:

3 "In this regard we note that defendant was  
4 obviously fully aware of the expert's opinions and  
5 analysis by no later than the date on which its  
6 counsel received the report and that it chose  
7 nonetheless to proffer her as an expert -- as its  
8 expert radiological witness to produce her report  
9 to the other parties as the summary of all  
10 opinions as to which she would testify at trial on  
11 its behalf to proffer her for deposition and then  
12 to list her as a witness in the joint pretrial  
13 order. These steps reflect an acceptance of the  
14 contents of the report sufficient to constitute an  
15 adoption."

16 And that's exactly the circumstances we have here.

17 THE COURT: So it's got nothing to do with whether  
18 or not Mr. Aronoff testifies in the rebuttal -- in the  
19 trustee's case.

20 UNIDENTIFIED SPEAKER: That's right, Your Honor.

21 THE COURT: It's --

22 UNIDENTIFIED SPEAKER: We're entitled to --

23 THE COURT: -- as part of your rebuttal case your  
24 point is that you're entitled to put into evidence those  
25 adoptive admissions, those portions of those reports because

1 those individuals were designated as trial witnesses.

2 UNIDENTIFIED SPEAKER: The deposition testimony,  
3 that's exactly right, Your Honor. And Mr. Aronoff would  
4 have presented an opportunity for that, but under the rules  
5 we can admit those statements regardless.

6 MR. HEALY: Your --

7 THE COURT: Mr. Healy.

8 MR. HEALY: Your Honor, first of all I haven't had  
9 a chance to look at the cases that are being cited. That's  
10 the -- so I note that.

11 I don't think that is by any means the only case  
12 on the issue. I have a different understanding of what the  
13 law is. I don't have cases in front of me. I would request  
14 the opportunity to cite cases to Your Honor.

15 But even if the case that was cited represents the  
16 law, what that case says, as I heard it, was that the  
17 reports, right, submitted by the expert can be submitted.  
18 We're fine submitting the reports from Mr. Burnett and Mr.  
19 O'Driskell.

20 UNIDENTIFIED SPEAKER: There --

21 MR. HEALY: Perfectly happy to do that if they  
22 would like to do that.

23 UNIDENTIFIED SPEAKER: Your Honor, the point of  
24 that case was simply that there were admissions by the other  
25 side and it wasn't really relevant whether it was report or

1 testimony. But there are other cases where expert  
2 deposition testimony has been admitted under the same rule,  
3 a different subsection, but the same rule. There are three  
4 separate subsections. One of them is the one I just  
5 recited, but also experts can be considered agents of the  
6 other party.

7 And to the extent experts are designated  
8 specifically on a subject matter, 801(d)(2)(C) provides that  
9 those admissions are admissible in evidence.

10 And so really on -- under whatever theory  
11 deposition testimony would be admissible -- and, again,  
12 there are cases and if you would like me to cite them I can,  
13 where deposition testimony, not just reports, but testimony  
14 has been admitted under this rule.

15 MR. HEALY: Well, the one case that I heard  
16 described said that the report could be submitted by the  
17 other side. And as I said we don't object to the admission  
18 of the reports. And to the extent any portions of the  
19 deposition transcripts are to be cited --

20 THE COURT: Well, the 801 is broader than the  
21 report.

22 MR. HEALY: I understand that. But the case that  
23 was doing the analysis --

24 THE COURT: Well, you know, I don't -- I don't  
25 like to do anything by ambush and I certainly can't tell you

1 that I have a full understanding of how this has been  
2 applied. I'm just a little surprised that we're having this  
3 kind of dispute as we're trying to close out --

4 UNIDENTIFIED SPEAKER: Yeah.

5 THE COURT: -- the case.

6 MR. HEALY: This is the first time we've heard of  
7 this, Your Honor. And had it been raised in advance we  
8 could have either discussed it and attempted to resolve it  
9 or at least I would have had the opportunity to look at the  
10 cases that were being relied upon and cited to the Court and  
11 to respond --

12 THE COURT: Would you have objected if this were  
13 raised in the cross-examination of Mr. Aronoff?

14 MR. HEALY: Yes.

15 UNIDENTIFIED SPEAKER: Your Honor, part of what's  
16 happened here is we've had to sort of go back and forth.  
17 Right. They had two expert witnesses on their list for  
18 trial that we spent an incredible amount of resources --

19 THE COURT: That's true.

20 UNIDENTIFIED SPEAKER: -- preparing both as it  
21 relates to their deposition testimony, providing reports and  
22 response, and then for trial. And then at the last minute  
23 they pulled them off the list on this AMA issue. They tell  
24 us Aronoff is coming in to testify. They pull him off the  
25 trial witness list now, you know, five minutes ago, ten

1 minutes ago.

2 And so we're constantly having to pivot to  
3 accommodate the changes because -- and, frankly, Your Honor,  
4 it's in part because they don't like what these experts  
5 testified to in deposition. They gave statements. They  
6 gave admissions that are materially supportive of the plan  
7 administrator's position and that really contradict their  
8 risk of loss theory generally. They don't like what they've  
9 said. They've taken them off the list and now they don't  
10 want those admissions which, again, under the law we're  
11 entitled to have in evidence.

12 MR. HEALY: Your Honor, respectfully, Mr. Runoff's  
13 testimony today has nothing to do with this. Mr. Aronoff  
14 testified at length and was cross-examined, I believe, at  
15 either -- at even more length. They had -- if they thought  
16 that there was a legitimate basis to use the deposition  
17 testimony or reports of other experts who were not appearing  
18 -- they knew who those experts were -- they were free to do  
19 it.

20 Secondly, as an aside, I would note that we're not  
21 the only party who has withdrawn witnesses. They've also  
22 withdrawn a witness. So I don't think there's anything  
23 shocking about the fact that witnesses were withdrawn.

24 And, third, the --

25 THE COURT: What witness have they withdrawn?

1 MR. HEALY: McClary (ph).

2 UNIDENTIFIED SPEAKER: Yeah. That was on a very  
3 small peripheral issue --

4 THE COURT: Okay. Well, I mean --

5 MR. HEALY: Well, no. No. No.

6 THE COURT: -- this --

7 UNIDENTIFIED SPEAKER: -- (indiscernible) --

8 MR. HEALY: (Indiscernible).

9 THE COURT: Okay. Look, this is devolving into  
10 not a good place. The fact of the matter is that what's  
11 going to happen is that you're going to have to do  
12 submissions and in order for me to meaningfully judge the  
13 submissions I'm going to have to look at the very materials  
14 that you're going to tell me shouldn't come in. That's the  
15 only way to -- if we're going to -- if we're going to parse  
16 this in terms of the expert reports and the deposition  
17 testimony, then I'm going to have to submissions and I'm  
18 going to have to have arguments from each of you as to why I  
19 should or should not look at each of them.

20 So I'm going to have looked at them. You can  
21 submit them. You can submit a letter and then it's just  
22 going to be folded into the opinion that I render at the end  
23 of the case. I -- this -- this just has to conclude.

24 UNIDENTIFIED SPEAKER: And we're --

25 MR. COSENZA: So, Your Honor, can I add one -- one

1 just --

2 THE COURT: Can we -- I'm going to go -- we're  
3 going to go off the record.

4 MR. COSENZA: Yeah.

5 THE COURT: Okay. And just have your teams and  
6 we're going to figure this out.

7 MR. COSENZA: Sure.

8 THE COURT: All right. That -- I see no reason to  
9 hold everybody here today.

10 Closing arguments will begin at 10 a.m. on  
11 February 5th.

12 Thank you.

13 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

14 (Whereupon, these proceedings concluded at 4:04 p.m.)

15 \* \* \* \* \*

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X		
T E S T I M O N Y		
DEBTOR'S		
WITNESS	EXAM BY	PAGE
N/A		

C E R T I F I C A T I O N

I, Sherri L. Breach, certify that the foregoing  
transcript is a true and accurate record of the proceedings.

Sherri L  
Breach

Digitally signed by Sherri L Breach  
DN: cn=Sherri L Breach, o, ou,  
email=digital1@veritext.com,  
c=US  
Date: 2018.01.24 16:17:09 -05'00'

Sherri L. Breach

AAERT Certified Electronic Reporter & Transcriber CERT\*D-397

Date: January 24, 2018

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501